**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matters of | ) | |
| | ) | CC Docket Nos. 98-147 et al. |
| Deployment of Wireline Services Offering | ) | |
| Advanced Telecommunications Capability, et al. | ) | |

**OPPOSITION OF GST TELECOM, INC.**
**AND KMC TELECOM INC.**

GST Telecom, Inc. ("GST") and KMC Telecom Inc. ("KMC"), through undersigned counsel and pursuant to Public Notice issued September 18, 1998, respectfully submit their opposition to the petitions for reconsideration filed by the Bell Atlantic telephone companies ("Bell Atlantic") and SBC Communications, Inc. et al. ("SBC") (together, "Petitioners") in the above-captioned dockets. GST and KMC strongly support the FCC's Order[1] which denied the relief sought by Bell Atlantic, SBC and other ILECs, and oppose the instant Petitions for Reconsideration. For the reasons specified herein, the FCC should deny the Petitions.

GST provides a broad range of integrated telecommunications products and services primarily to business customers located in the western continental United States and Hawaii. As a facilities-based competitive local exchange carrier ("CLEC"), GST operates state-of-the-art, digital telecommunications networks serving 40 markets in Arizona, California, Hawaii, Idaho, New

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11, *Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91, Memorandum Opinion and Order, FCC 98-188, released August 7, 1998 ("*Advanced Services Order*").

Mexico, Texas and Washington. GST offers a one-stop solution to customers' telecommunications service requirements, including local dial tone, long distance, Internet, data transmission and private line services.

KMC is authorized to provide, through its subsidiaries, competitive local and long distance services in 17 states, and Puerto Rico, and is operational in six states (Alabama, Florida, Georgia, Louisiana, Texas, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Florida; Savannah and Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Corpus Christi, Texas; and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

## I. SUMMARY

Petitioners ask the Federal Communications Commission ("FCC") to reconsider or clarify two aspects of its *Advanced Services Order*. Petitioners first argue that the FCC improperly construed the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), in determining that Section 706 is not an independent grant of forbearance authority. Petitioners also argue that the FCC's statements regarding incumbent local exchange carriers' ("ILECs") obligation to provide loop conditioning violates the Eighth Circuit holding that struck down the so-called superior quality rules. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998). For the reasons specified below, the FCC should deny Petitioners' requests for reconsideration and clarification.

## II. THE COMMISSION PROPERLY FOUND THAT SECTION 706 IS NOT AN INDEPENDENT GRANT OF FORBEARANCE AUTHORITY

In its *Advanced Services Order*, after examining the statutory language, purpose, and legislative history of the 1996 Act, the FCC found that Section 706 is not an independent grant of forbearance authority.[2] Rather, the Section 706 reference to regulatory forbearance directs the FCC to implement Section 706 by using the forbearance authority granted it by Section 10 of the Act. Petitioners erroneously argue that the FCC's conclusion is based on Section 10(d). Petitioners seem to be basing their argument on the following statement in the *Advanced Services Order*:

> As stated above, section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 "until it determines that those requirements have been fully implemented." There is no language in section 10 that carves out an exclusion from this prohibition for actions taken pursuant to section 706.

*Advanced Services Order* at ¶72. Petitioners would have the FCC reverse its finding because they allege the Section 10(d) limitations explicitly apply only to FCC action taken under Section 10(a), not to action taken under Section 706.

Petitioners are correct in their assertion that Section 10 of the Act and Section 706 of the 1996 Act must be read together in context. In Section 10, Congress granted the FCC the authority to forbear from applying any regulation or provision of the Act, with important exceptions, if certain conditions are met. The important exceptions are that the FCC may not forbear from applying the requirements of Section 251(c) or 271 until the FCC determines that those requirements have been

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[2] *Advanced Services Order* at ¶69.

fully implemented. 47 U.S.C. §160(d). Section 10 of the Act thus grants and defines the FCC's forbearance authority.

Section 706 of the 1996 Act directs the FCC to take certain actions to meet the goal of increasing the deployment of advanced telecommunications capability to all Americans. By its plain terms, however, Section 706 only authorizes the FCC to use existing regulatory tools, such as its forbearance authority or price cap regulation, to achieve those goals. Section 706 does not grant the FCC regulatory forbearance authority independent of that granted in Section 10. Well-settled principles of statutory construction provide that specific provisions govern provisions of general application.[3] Section 10 specifically defines the FCC's forbearance authority. Its limits cannot be read out of the Congressional directive to use such forbearance authority in implementing Section 706.

This conclusion is buttressed by the application of another basic principle of statutory construction. Whenever Congress uses an identical word or phrase in different parts of the same statute, they are intended to have the same meaning. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995) (citations omitted). Since Congress used an identical phrase in Sections 10 and 706 ("regulatory forbearance"), Congress must have intended that the regulatory forbearance authority of the FCC in Section 706 was coextensive with that of Section 10.

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[3] *See, e.g., Aeron Marine Shipping Co. v. United States*, 695 F.2d 567 (D.C. Cir. 1982); *In re Brown*, 329 F. Supp. 422 (S.D. Iowa 1971) ("However inclusive the general language of the statute, it will not be held to apply or prevail over matters specifically dealt with in another part of the same enactment.")

Section 271(c)(4) provides further and independent evidence of the FCC's lack of authority to modify the Section 271 prohibition. That Section provides:

> The [FCC] may not, ***by rule or otherwise***, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).

47 U.S.C. §271(c)(4) (emphasis added). Once again, Petitioners do not even attempt to explain how the FCC can ignore this clear and unmistakable statutory directive that the FCC may not modify, by rule or otherwise (*i.e.*, regulatory forbearance), the Section 271 checklist requirements. Thus the absence of any reference to Section 271 in Section 706 is a fatal omission. Again, the specific statutory provision trumps the general one, and the FCC may not use Section 706 to ignore or override the clear Congressional directive prohibiting it from altering the Section 271 competitive checklist requirements.

If the FCC granted the relief sought by petitioners, they would be limiting the application of Section 271's checklist to certain telecommunications services and not applying it to other telecommunications services. This interpretation contradicts the express language of the statute prohibiting the FCC from limiting the application of the 271. Adopting Petitioners' construction of Section 706 would not give effect to all provisions of the Act in violation of the basic canon of statutory construction that all sections of a statute must be given effect and read in harmony.[4] Ironically, this is the very cannon of statutory construction upon which SBC bases its request for reconsideration. *See* SBC Petition at 7.

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[4] *United States v. Menasche*, 348 U.S. 528 (1955).

The FCC has already examined the interplay between Sections 10 and 706 and determined, in light of the statutory language of Sections 10 and 706 and the structure and purpose of the 1996 Act, that its forbearance authority is both granted and limited by Section 10. Petitioners present no new arguments which the FCC has not already considered. These petitions for reconsideration are the latest example of the Petitioners' efforts to stall and delay the onset of competition in the local exchange markets. As one judge hearing an ILEC's interconnection agreement appeal has observed,[5] the ILECs' penchant for rehashing issues and fighting for losing causes is both distressing and an undue burden on the decision-maker. The Petitioners' request for reconsideration must be denied.

## III. LOOP CONDITIONING DOES NOT VIOLATE *IOWA UTILITIES BOARD*

In the *Advanced Services Order*, the FCC required ILECs to provide conditioned loops when requested and stated that an ILEC may not deny a request on the ground that it does not itself offer advanced services over the loop.[6] Petitioners contend on reconsideration that this requirement violates *Iowa Utilities Board* because in that decision the Eighth Circuit vacated the requirement adopted in the *Local Competition Order*[7] that ILECs provide on request a quality of unbundled

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[5] *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*, NO. A 97-CA-132-SS, slip op. (W.D. Tex. Sept. 7, 1998) ("SWBT's penchant for rehashing issues that had already been fully briefed, ... [was], to say the least, distressing. The voluminous briefing in this case – over seven hundred pages in total – could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorous point").

[6] *Advanced Services Order* at ¶53.

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, ¶¶694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118

network elements ("UNEs") superior to that the ILEC provides to itself.[8] Petitioners contend that the loop conditioning requirement of the *Advanced Services Order* must be rescinded or the FCC must determine that ILECs must provide conditioned loops only to the extent they provide such conditioning to themselves.[9]

Since xDSL service requires loop qualification and conditioning, acceptance of the Petitioners' argument would mean that the ILECs, and only the ILECs, could determine when xDSL services would be made available on their existing networks. Congress enacted the 1996 Act to foster the development of advanced telecommunication services and promote competition in the provision of local exchange service. Congress could not have intended to imbue the ILECs with enhanced ability to dictate what services could be delivered over their networks while trying to increase competition.

The loop conditioning requirement of the *Advanced Services Order* does not rise to the level of the requirement that ILECs provide superior quality UNEs, a requirement that the Eighth Circuit found unlawful, and does not violate *Iowa Utilities Board*. Petitioners' arguments do not warrant reconsideration because the loop conditioning requirement does not constitute an obligation to

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S.Ct. 879 (1998).

[8] Section 51.311(c) of the FCC's rules, 47 C.F.R. Section 51.311(c), before it was vacated by the Eighth Circuit, provided in part that: "To the extent technically feasible, the quality of any unbundled network element, as well as the quality of the access to such an unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself."

[9] Bell Atlantic petition at 3.

construct "yet unbuilt superior" networks.[10] As is obvious, loops are part of the existing network. And, loop conditioning is an everyday aspect of providing a variety of services over the local loop. Thus, ILECs add to, or remove from, loops a variety of devices on a continuing basis in order to provide adequate service. ILECs also perform precisely the type of conditioning required to provide advanced services – cleaning-up loops so that they are not encumbered with devices that interfere with provision of advanced services – in order to provide other services such as some private line and ISDN services. Thus, the FCC should reject Petitioners' view that providing loop conditioning to CLECs constitutes an unusual, special, superior, or new service.

Moreover, the FCC in the *Advanced Services Order* did not state or determine that ILECs must offer a superior or higher quality UNE than what the ILEC uses for its own provision of services. The FCC only stated that ILECs must provide conditioned loops regardless of whether the incumbent provides advanced services. While Petitioners would prefer the FCC to interpret this statement to establish a requirement that they believe requires the FCC to rescind it, it is not necessary for the FCC to give it such an interpretation. GST and KMC believe that the FCC was merely stating that purchasers of UNEs may use them to provide any telecommunications service regardless of whether the incumbent is providing any services the purchaser plans to provide. This merely restates the determination in the *Local Competition Order* that new entrants may use UNEs to provide any telecommunications service.[11] Thus, petitioners are erroneous in assuming that the

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[10] 120 F.3d at 813.

[11] *Local Competition Order* at ¶292.

*Advanced Services Order* imposed a requirement that ILECs provide UNEs superior to what ILECs use themselves.

In any event, as long as the ILECs are, in fact, conditioning loops in their own provision of service, they must also provide conditioned loops to CLECs even if the FCC accepts Petitioners' interpretation of Section 251(c)(3). As explained previously, loop conditioning is an ordinary part of providing service over the loop. Loops conditioned by removal of all interfering devices already exist in the network and are used in the provision of ISDN service and some private line services. In addition, it is clear that incumbents are, or soon will be, providing advanced services and that they will need to use conditioned loops to do so.[12] Thus, ILECs must provide loop conditioning to CLECs because they are providing it to themselves.

[12] ILECs are deploying xDSL and other advanced services throughout the United States. *Advanced Services Order* at ¶10 (incumbent wireline carriers are today at the early stages of deploying advanced services).

## IV. CONCLUSION

For the foregoing reasons, GST and KMC respectfully request that the FCC affirm on reconsideration that it lacks authority under Section 706 of the 1996 Act to forbear from application of Section 251(c) obligations to ILECs; and affirm its requirement that ILECs must provide conditioned loops on request. The FCC should deny the SBC and Bell Atlantic petitions for reconsideration.

Respectfully submitted,

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October 5, 1998

## CERTIFICATE OF SERVICE

I, Wendy Mills, do hereby certify that a copy of GST Telecom, Inc.'s and KMC Telecom Inc.'s Opposition was served on the following by first class U.S. mail, postage prepaid, or hand delivery (*) this 5th day of October, 1998:

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